SABAH BANKING EMPLOYEES' UNION

v.

SABAH COMMERCIAL BANKS' ASSOCIATION

SUPREME COURT, KOTA KINABALU
ABDUL HAMID OMAR LP
LEE HUN HOE CJ (BORNEO)
MOHD. YUSOFF MOHAMED SCJ
[CIVIL APPEAL NO. 501 OF 1987]
5 MAY 1989

LABOUR LAW: *Certiorari - Industrial Court award - Validity of awards fixing retirement benefits by fixing percentage of EPF contributions greater than 11% - Validity of retrospective award - Whether excess of jurisdiction - Observations on role of High Court in supervising Industrial Court awards.*

The appellant and the respondent had entered into a collective labour agreement in relation to the terms of employment of non-officer bank employees in Sabah. All issues were agreed and embodied in the said collective agreement, save for the quantum of retirement benefits. The collective agreement was deposited with the Industrial Court which has taken cognizance of it.

The parties also made a joint application to the Minister under s. 26(1) of the Industrial Relations Act 1967 ("the Act") to settle the quantum of retirement benefits and the Minister referred the same to the Industrial Court.

The Industrial Court made an award on 28 December 1985 providing *inter alia* that "with effect from 1 December 1985 the banks shall contribute each month 15% of the wages for that month to the EPF" (which shall include the employer's contribution under the EPF Laws) and that ... "wages shall have the same meaning assigned to it by the EPF Act 1951."

During negotiation stage, the appellant sought retirement benefits based on 15% of all wages including the additional allowance given for service in Sabah whereas the respondent proposed 15% of the basis salary.

The respondent was granted the order of *certiorari* on the ground that no basis could be found for the quantum of retirement benefits, and that, if any basis existed, it would have been an error of law in that the retirement benefits was in excess of the 11% set by the EPF Act and thus an illegal payment and without basis whatsoever.

The respondent had however itself before the Industrial Court described its own position on retirement benefits as a percentage contribution to the EPF.

Held:

[1] The EPF Act did not say "11% and absolutely not a cent more"; this Act did not prevent negotiations over retirement benefits. The Industrial Court therefore did not act in excess of its jurisdiction in making the award based on a percentage greater than the 11%.

[2] Following *Dr. A. Dutt v. Assunta Hospital* that s. 30(6) of the Act gave the Industrial Court considerable leeway in the relief to be granted and hence could rule on whether retirement benefits would take the form of contributions to the EPF fund. The Industrial Court therefore did not ask itself the wrong question thereby making its decision a nullity on ground of excess of jurisdiction.

[3] The respondent had consented to the Industrial Court deciding the question and by so doing consented to abide by a decision that may be made by it in accordance with law.

[4] Errors in calculations or in other factual considerations do not go to the Industrial Court's jurisdiction.

[5] The retrospective effect of the Industrial Court's award does not conflict with s. 7(3) of the EPF Act in light of s. 30(7) of the Act.

[Appeal Allowed.]

Cases referred to:

South East Asia Fire Bricks v. Non-Metallic Mineral Products Manufacturing Employees Union [1980] 2 MLJ 165

Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 AC 147

Non-Metallic Mineral Products Manufacturing Employees Union v. Malaya Glass Factory Bhd. [1984] 1 CLJ (Rep) 305

Federal Hotel Sdn. Bhd. v. National Union of Hotel, Bar and Restaurant Workers [1983] CLJ (Rep) 150

Dr. A. Dutt v. Assunta Hospital [1981] 1 MLJ 304

Legislation referred to:

Employees Provident Fund Act 1951, s. 7(3)
Employees' Social Security Act 1969, ss. 31, 42
Industrial Relations Act 1967, ss. 2, 26(1), 30(4), (6), (7), 33B(1)

For the appellant - K.P. Gengadharan (Norbert Yapp with him); M/s. Jayasuriya Kah & Co.
For the respondent - T.M. Varughese (Tunku Sofiah Jewa with him); M/s. Hj. Mohd. Noor, Dr. Yaccob & Ismail

JUDGMENT

Abdul Hamid Omar LP:

The question we shall have to decide in this appeal is whether the High Court properly entertained the motion for *certiorari* to quash an award from the Industrial Court. In determining the question it is necessary for us to consider the proper approach the Court below should take in exercising its supervisory role in regard to an Industrial Court award which, in law, is somewhat protected from full appellate review.

The appellant, Sabah Banking Employees' Union, represents non-officer bank employees in the State of Sabah. In 1985, labour contract negotiations were conducted between the appellant and the Sabah Commercial Banks' Association (the respondent) for a new collective labour agreement covering bank branches in that state. The parties reached agreement on all issues except the quantum of retirement benefits. During negotiations, the respondent proposed retirement benefits 15% of the employee's basic salary while the appellant had sought retirement benefits based on 15% of all wages, including the "Sabah Allowance", an allowance given to compensate for the state's high cost-of-living.

In July 1985 the parties signed a document embodying the agreed terms of a new collective labour agreement. This agreement was deposited with the Industrial Court which took cognizance of it on 9 August 1985. The parties also made a joint application to the Minister of Labour under s. 26(1) of the Industrial Relations Act 1967 (the Act) to settle the quantum of retirement benefits. Pursuant to s. 26(1) of the Act, the Minister of Labour referred this dispute to the Industrial Court for adjudication. On 28 December 1985, the Court made Award No. 268/85 which provided, in part, that:

(4) ...

(a) with effect from 1 December 1985, the banks shall contribute each month 15% of the wages for that month to the Employees Provident Fund. Such contribution shall be deemed to be inclusive of any employer's contribution to the Employees Provident Fund as may be prescribed by law from time to time.

(b) for the purpose of sub-clause (a) above, 'wages' shall have the meaning assigned to it be the EPF Act 1951.

The respondent applied for a writ of *certiorari* to quash the award. On 2 September 1987, the High Court Borneo allowed the application and quashed Award No. 268/85 on the grounds that no basis could be found for the quantum of retirement benefits and that, if any basis existed, it would have been an error of law. Hence this appeal.

As in other *certiorari* cases considered by this Court and by the Privy Council, two essential questions must be borne in mind. First, to what degree are awards of the Industrial Court statutorily protected from correction and supervision by the High Courts? Second, is this award infirm in such a way that it should have been quashed by the High Court in exercising its limited supervisory function?

The first of these two questions has caused some confusion as to when and under what circumstances a writ of *certiorari* is appropriate against an Industrial Court award.

Industrial Court awards are statutorily sheltered from appellate review by s. 33B(1) of the Act which provides that "an award, decision or order of the Court ... shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed, or called in question in any Court." Nonetheless, it has been consistently held that such privative or ouster clauses cannot prescribe *certiorari* against awards that exceed the inferior tribunal's jurisdiction. The Privy Council so interpreted this same ouster clause when it was then s. 29(3) of the Act. *South East Asia Fire Bricks v. Non-Metallic Mineral Products Manufacturing Employees Union* [1980] 2 MLJ 165, at 166-167 (PC). And following the decision of the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147 at p. 171 Lord Reid in his speech made it clear that the ouster clause will not have the effect of ousting the power "although the tribunal had jurisdiction to enter on the inquiry if it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity." The decision may be a nullity by reason of a breach or failure to comply with the requirements of natural justice. The writ of *certiorari* clearly survives because it is fundamental to the Courts' constitutional and common law role as the guarantors of due process and the fair administration of law.

Another ground for *certiorari* is that the decision maker acted in excess of its jurisdiction. Such jurisdictional error occurs where a tribunal enters into an inquiry and makes a decision over which it has no authority, to do. Such an error occurred in *Non-Metallic Mineral Products Manufacturing Employees Union v. Malaya Glass Factory Bhd.* [1984] 1 CLJ (Rep) 305. In that case an Industrial Court award dealt with the "check-off", i.e. automatic deduction, of union dues. The Federal Court held that this provision of the award was in excess of the Court's jurisdiction to handle trade disputes in s. 2 of the Act, i.e. it is not connected with the employment or non-employment or the terms of employment or the conditions of work.

We turn now to consider whether the relevant parts of Industrial Court Award No. 268 should have been quashed.

The argument against the award rests on statutory provisions in the Employees Provident Fund Act 1951 ("the EPF Act"). The EPF Act establishes a national Employees Provident Fund ("the Fund") and fixes statutory rates of contribution to the Fund. These rates are set

as a percentage of "wages" which under the EPF Act include "any allowance ... in respect, either explicitly or impliedly, of high cost of living." According to the Third Schedule of the EPF Act, the statutory rate of contribution applicable to these banks for these employees would be 11%. Although establishing this rate, there was nothing in the EPF Act to prevent negotiations over retirement benefits. An employer may voluntarily elect to contribute more to the Fund than the statutory rate. Furthermore it appears that an employer may give additional retirement benefits outside the Fund. Accordingly the employees and their representatives unions are free to seek such benefits, as the appellant did here.

The respondent argued before the High Court that the Industrial Court acted in excess of jurisdiction by issuing an award fixing retirement benefits above the 11% required by the EPF Act. The learned Judge considered it as the respondent's argument that the award directly breached a statutory provision and that it also denied the association certain rights, i.e. to elect and/or revoke payments above 11%. (Grounds at 3-4).

The respondent also claimed that the Court acted in excess of jurisdiction by making an award of benefits retrospective to the beginning of December 1985, by doing its own computations of the banks' EPF liability, upon interpretation of various provisions by the EPF Act and by failing to consider s. 30(4) of the Act. We should add that the respondent also has said that the Industrial Court's analysis led it to a conclusion so unreasonable that no reasonable tribunal would arrive at it.

It is clear from the record and oral argument before us that the respondent did not complain of any breach of the principles of natural justice. Nor did the respondent claim that the Court lacked jurisdiction to enter into the general inquiry it undertook. The disagreement over retirement benefits was clearly a trade dispute properly before the Industrial Court upon reference made to it under s. 26(1) of the Act.

As the learned Judge in the Court below recognized, the allegation of lack of jurisdiction or "jurisdictional error" was used in a much wider sense. The principal argument of the respondent that the Industrial Court lacked power in that it acted outside the scope of its authority when awarding retirement benefits in excess of the 11% set by the EPF Act. Indeed, the learned Judge below granted *certiorari* on this ground alone, holding the excess to be an "illegal payment and without basis whatsoever."

In reply, it is the appellant's contention that the respondent consented to the Industrial Court reference and therefore abide to whatever was decided. The respondent contends that this consent could not give the Court jurisdiction or power it does not already have. As this Court said in *Federal Hotel Sdn. Bhd. v. National Union of Hotel, Bar and Restaurant Workers* [1983] CLJ (Rep) 150 at p. 154:

> It is a fundamental principle that no consent or acquiescence can confer on a Court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such Court or tribunal has acted without jurisdiction. (See *Essex County Council v. Essex Incorporated Congregational Church Union* [1963] AC 808, 820, 821 (at pp. 820-821 per Lord Reid)).

The respondent's argument would appear to be on all fours with *Federal Hotel* case if in the event the Industrial Court had decided a question that was not a trade dispute. But unlike the *Federal Hotel* case where the tribunal acted beyond the statute creating both it and its jurisdiction; here the parties agreed to bring a trade dispute to a tribunal, fundamentally, is that the jurisdiction or powers created by the Act are further limited by the EPF Act. According to this argument, the EPF Act limit of 11% must be construed to deny

power to grant some relief that would otherwise be within the Industrial Court's powers. Conceivably this was a case of a particular category of excess of jurisdiction as in *Non-Metallic Mineral Products Manufacturing Employees Union v. Malaya Glass Factory Bhd.* (*supra*) where an award provision relating to accident leave was found to conflict with the statutory liability scheme created by ss. 31 and 42 of the Employees' Social Security Act 1969.

If, in the present case, the EPF Act said, "11% and absolutely not a cent, more" we might agree that the respondent's consent could not confer power on the Industrial Court to go beyond 11%. But such is not the position before us.

The distinguishing feature however is that in *Non-Metallic Mineral Products Employees Union*, the Industrial Court decided on a reference from the Minister of Labour acting of his own motion after the union had resorted to industrial action whilst in the present case, the appellant and the respondent mutually agreed to refer the dispute to the Industrial Court under s. 26(1). The respondent in effect consented to have the Industrial Court decide this question and by so doing consented to abide by a decision that may be made by it in accordance with law.

This agreement to abide by the Industrial Court's decision leads us to another point. The respondent has argued that while the parties agreed to refer the quantum of retirement benefits, the Industrial Court decided the quantum of contributions to the EPF. And as such the Industrial Court had in fact asked itself the wrong question thereby making its decision a nullity on ground of excess or lack of jurisdiction.

In our view, it strains credulity to say that the Industrial Court could decide retirement benefits, but not rule on whether these would be contributions to the Fund. Section 30(6) of the Industrial Relations Act provides that,

> the Court shall not be restricted to the specific relief claimed by the parties ... but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute ...

It has been held in the past that this gives the Industrial Court considerable leeway in the relief it grants: *Dr. A. Dutt v. Assunta Hospital* [1981] 1 MLJ 304, 313-14. In the present case, the Court must have considered the fact that fixing retirement benefits alone without saying how they would be invested would potentially leave the trade dispute unsettled.

Moreover, respondent's argument suggests that we are not expected to read the record in this case. In its original Statement of Reply filed with the Industrial Court, the respondent itself described its own position on retirement benefits as a percentage contribution to the EPF. It cannot therefore be heard to say that the Court approached the issue of benefits from the wrong perspective. The Industrial Court asked itself the question put to it by the parties and answered that question in the very terms used by both the appellant and the respondent.

In the grounds of his decision, the learned Judge did not explicitly accept any of the respondent's other arguments against the award. It is however important to note that the Industrial Court's consideration of the intention of the parties, the history of retirement benefits for these workers, and the benefits enjoyed by other bank workers were all within its powers. So too was its calculation of EPF benefits. Errors in such calculations or in other factual considerations would not, in our view, go to the Industrial Court jurisdiction. The

Industrial Court award was dated 28 December 1985, but ordered that payments be effected as of the first of that month. The respondent has argued that this order made with retrospective effect conflicts with EPF Act s. 7(3).

We are of the view that there is no validity in the respondent's contention as it cannot be said that the Industrial Court acted in excess of the jurisdiction bearing in mind, firstly that the retrospective date of the award is not in breach of or inconsistent with s. 30(7) of the Act which reads:

> 30. (7) An award may specify the period during which it shall continue in force, and may be retrospective to such date as is specified in the award:
>
> Provided that the retrospective date of the award may not, except in the case of a decision of the Court under s. 33 or an order of the Court under s. 56(2)(c) or an award of the Court for the reinstatement of a workman on a reference to it in respect of the dismissal of a workman, be earlier than six months from the date on which the dispute was referred to the Court.

Secondly, it was the Court's function to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form and above all the fact that the parties had agreed to refer the dispute several months later.

For these reasons, we see no ground whatsoever for the Court below to interfere with the award made by the Industrial Court. The order of the High Court is therefore set aside and substituted therefore an order that the application be dismissed with costs. The Industrial Court award is reinstated. The deposit shall be refunded to the appellant.

Also found at [1989] 2 CLJ 135